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No. 03-1500

In the Supreme Court of the United States

THOMAS VAN ORDEN,

Petitioner,

vs.

RICK PERRY, in his official capacity as Governor of Texas and Chairman, State Preservation Board; DAVID DEWHURST, in his official capacity as Co-Vice Chairman, State Preservation Board and President of the Senate of Texas; TOM CRADDICK, in his official capacity as Co-Vice Chairman, State Preservation Board and Speaker of the House of Representatives of Texas; CHRIS HARRIS, in his official capacity as Member of the State Preservation Board; PEGGY HAMRICK, in her official capacity as Member of the State Preservation Board; JOCELYN LEVI STRAUSS, in her official capacity as Member of the State Preservation Board; CHARLYNN DOERING, in her official capacity as Interim Executive Director, State Preservation Board,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MERITS BRIEF *AMICUS CURIAE* OF AMERICAN ATHEISTS IN SUPPORT OF THE PETITONER

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INTEREST OF AMICUS CURIAE[1]

American Atheists is a volunteer organization active in protecting the rights of Atheists and promoting tolerance and understanding of the Atheist viewpoint. Founded in 1963 by Madalyn Murray O'Hair,[2] for over thirty years American Atheists has been dedicated to the separation of church and state and a tireless advocate of the Atheist cause.[3] American Atheists' perspective is rooted in the philosophy of materialism, "which holds that nothing exists but natural phenomenon."[4]

> The indestructible foundation of the whole edifice of Atheism is its philosophy, materialism, or naturalism, as it is also known. That philosophy regards the world as it actually is, views it in the light of the data

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[1] The parties have consented to the filing of this brief. Copies of the letters of consent of the Petitioner are on file with the Clerk of the Court. A copy of the letter of consent of the Petitioner and Respondent included in the Appendix. Counsel for American Atheists authored this brief in its entirety. No person or entity, other than American Atheists, its supporters or its counsel, made a monetary contribution to the preparation or submission of this brief.

[2] Ms. O'Hair founded American Atheists following the United States Supreme Court ruling in School District of Abington Township, Pennsylvania v. Schempp, 374 U.S. 203 (1963), overturning the Maryland Court of Appeals' approval of public school bible readings in her case, Murray v. Curlett, 228 Md. 239, 179 A.2d 698 (1962).

[3] Ms. O'Hair and American Atheists' work includes the founding of the first known Atheist library and archives in the United States, production of American Atheist Forum, the first regularly scheduled television program produced, directed, and broadcast by Atheists, founding of the American Atheist Press, the American Atheist magazine, and the American Atheist Radio Series, and countless other cultural and legal contributions to the Atheist cause.

[4] Madalyn Murray O'Hair, Atheism, American Atheists, at http://www.atheists.org/Atheism/atheism.html (last visited December 9, 2004).

provided by progressive science and social experience. Atheistic materialism is the logical outcome of scientific knowledge gained over the centuries.[5]

No gods, spirits, fairies, or other imagined entities pull at the strings of humanity. The materialist philosophy of Atheism promotes a positive viewpoint and provides the impetus to effect change.

> Materialism liberates us, teaches us not to hope for happiness beyond the grave but to prize life on earth and strive always to improve it. Materialism restores to man his dignity and his intellectual integrity. Man is not a worm condemned to crawl in the dust, but a human being capable of mastering the forces of nature and making them serve him. Materialism compels faith in the human intellect, in the power of knowledge in man's ability to fathom all the secrets of nature and to create a social system based upon reason and justice. Materialism's faith is in man and his ability to transform the world by his own efforts. It is a philosophy in every essence optimistic, life-asserting, and radiant. It considers the struggle for progress as a moral obligation, and impossible without noble ideals that inspire men to struggle, to perform bold, creative work.[6]

Given American Atheists' unswerving dedication to the Atheist cause for over three decades, American Atheists submits this brief in support of Petitioner and urges the Court to reverse the decision of the Fifth Circuit Court of Appeals.

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[5] Id.
[6] Id.

SUMMARY OF THE ARGUMENT

Both the Ten Commandments monument, which is prominently displayed alone on the grounds of the Texas state capitol for the purpose of commending the Eagles organization and for the purpose of signifying the role of the Ten Commandments in the enactment, administration, and construction of the laws of Texas, along with its enabling state legislation, violate the prohibition of the Establishment Clause of the First Amendment that "Congress shall make no law respecting an establishment of religion," as applied to the states through the Fourteenth Amendment. No plausible reason justifies the endorsement and promotion of the sacred text of Judaism and Christianity as a way of commending the Eagles organization other than the endorsement of religion in general or the endorsement of a particular set of religious beliefs. As a result, the monument and the legislation lack a valid secular purpose under the first Lemon prong. In addition, the prominent placement of the monument and its lack of relevance to the dedicated purpose of the National Historic Landmark, are sufficiently likely to be perceived by adherents of the Ten Commandments as an endorsement, and by nonadherents as a disapproval, of their individual religious choices. As a result, the monument and legislation violate the second prong of Lemon.

ARGUMENT

I. THE RESPONDENTS' DISPLAY OF THE TEN COMMANDMENTS MONUMENT VIOLATES THE VALID SECULAR PURPOSE REQUIREMENT OF THE ESTABLISHMENT CLAUSE REGARDLESS OF ANY ALLEGED SECULAR CONTENT OR CONTEXT.

To satisfy the first prong of Lemon, a challenged statute "must have a secular legislative purpose." Lemon v. Kurtzman, 403 U.S. 602, 612 (1971). This prong is violated if the statute is "motivated wholly by an impermissible purpose." Lynch v. Donnelly, 465 U.S. 668, 680 (1984). While courts are normally deferential to government's articulation of secular purpose, close examination is important to reveal insincere or sham purposes. Edwards v. Aguillard, 482 U.S. 578, 586-87 (1987). There is a reluctance to attribute unconstitutional motives to the states when there is "a plausible secular purpose … discernable on the face of the statute." Meuller v. Allen, 463 U.S. 388, 394-95 (1983). But where a legislature has a pre-eminent religious purpose in enacting a statute, a court need not be blind to that purpose, even where the legislature proffers a secular purpose. Edwards, 482 U.S. 578, 589-590.

> It is not a trivial matter, however, to require that the legislature manifest a secular purpose and omit all sectarian endorsements from its laws. That requirement is precisely tailored to the Establishment Clause's purpose of assuring that Government not intentionally endorse religion or a religious practice.

Wallace v. Jaffree, 472 U.S. 38, 75 (1985) (O'Connor, J., concurring). "This intention may be evidenced by promotion of religion in general, . . . or by advancement of a particular religious belief." Edwards, 482 U.S. 578, 585; See, Church of the Lukumi Babalu Aye v. Hialeah, 508 U.S. 520, 540 (1993). Thus, in addition to insincerity or sham of the stated purpose, the lack of a secular purpose may be found on the face of a statute by its (1) implausibility, (2) promotion of religion in general, or (3) advancement of a particular religious belief. In this case, the proffered secular purpose is implausible, promotes religion in general, and advances a particular religious belief.

This Court has already unequivocally determined the religious nature of the Ten Commandments. In Stone v. Graham, 449 U.S. 39 (1980), this court was faced with an "avowed" secular purpose recited in the text of the law requiring their posting on the schoolhouse wall, and in small print at the bottom of each display: "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States." The Commandments' religious content was held to be unmistakable when this Court held that "The Ten Commandments are undeniably a sacred text in the Jewish and Christian Faiths and no legislative recitation of a supposed secular purpose can blind us to that fact." Id., at p. 41. The Court referred to the alleged partial secular content of the Decalogue as merely "arguable":

> The Commandments do not confine themselves to arguably secular matters, such as honoring one's parents, killing or murder, adultery, stealing, false witness, and covetousness. See Exodus 20: 12-17;

> Deuteronomy 5: 16-21. Rather, the first part of the Commandments concerns the religious duties of believers: worshipping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath Day. See Exodus 20: 1-11; Deuteronomy 5: 6-15.

Id., at pp. 41-42 (footnote omitted). As a result, this Court in Stone rejected the avowed secular purpose as facially implausible. Id.

The Fifth Circuit opinion relies on exactly the type of reasoning that this Court firmly rejected in Stone:

> Even those who would see the Decalogue as wise counsel born of man's experience rather than as divinely inspired religious teaching cannot deny its influence upon the civil and criminal laws of this country. That extraordinary influence has been repeatedly acknowledged by the Supreme Court and detailed by scholars. Equally so is its influence upon ethics and the ideal of a just society.

351 F.3d 173, 182; "The plaintiff's contention here forgets that the Commandments have a secular dimension as well as a religious meaning." 351 F.3d 173, 179. The Fifth Circuit opinion fails to cite any authority for these dubious and unsupported conclusions that are contrary to the findings of this Court in Stone, and they are without support in the record below. The Fifth Circuit opinion fails to name any secular scholar or identify any opinion of this Court attesting to these propositions. Which law of Texas or elsewhere derives from the commandment "Remember the Sabbath day, to keep it holy," which presumably includes requiring slave owners to give them a day off? Which laws of Texas or elsewhere derive from the commandment that we don't have freedom to

express anti-theistic opinions or that we are to not covet our neighbor's wife? Nowhere do the Ten Commandments prohibit slavery, drunken driving, or father-daughter incest. They set no useful health standards, no monetary or judicial criteria, and no social service standards. They are useless in matters of probate, contract law, human/civil rights, and constitutional law. Of the Ten Commandments, four address themselves to how and when to worship the proper gods, and two concern women simply as pieces of property.

The court in ACLU v. McCreary County, Kentucky, 354 F.3d 438, 452 (6th Cir. 2003) found it significant that neither the defendants nor the dissent attempted to buttress the historical claim that the Ten Commandments have a foundational role in the law. It is no less significant here that the Fifth Circuit's reliance on the foundational importance of the Ten Commandments in the formation of laws has no support in the record below, in the decisions of this Court, or from a generally accepted secular historical record.

The proffered secular purpose for the installation of the Ten Commandments monument was gleaned by the district court and the Fifth Circuit opinion from the resolution granting the Eagles permission to erect the monument: "to recognize and commend a private organization for its effort to reduce juvenile delinquency." 351 F.3d 173, 178. The Fifth Circuit opinion accepted the stated secular purpose without examination because there was "nothing in either the legislative record or the events attending the monument's installation to contradict the secular reasons laid out in the legislative record." 351 F.3d 173, 179.

The Fifth Circuit's confinement of its examination to whether there is contradictory language in the legislative record itself or to events attending the installation of the monument is superficial. Upon closer examination, the

proffered secular purpose for the Ten Commandments monument fails all three of the tests of plausibility, promotion of religion in general, and advancement of a particular religious belief.

The Fifth Circuit opinion's reliance on the recited legislative purpose for the installation of the monuments is exactly the type of blind deference that this Court explicitly rejected in Stone: "The Ten Commandments are undeniably a sacred text in the Jewish and Christian Faiths and no legislative recitation of a supposed secular purpose can blind us to that fact." Stone, supra, at p. 41. The implausibility of the proffered secular purpose for the Texas Capitol monument is readily apparent. There is simply no rational correlation between the state's supposed appreciation for the efforts of the Eagles organization to reduce juvenile delinquency and the state's adoption and promotion of a religious text having no obvious connection to the Eagles. Would the state's sponsorship of a celebration of a Catholic Mass on the steps of the Capitol bear any rational relationship to commending the Eagles even if the legislature deemed it so? Could the installation of a loudspeaker on the Texas Capitol grounds blaring out a religious text twenty-four hours a day rationally be considered proportional or commensurate to Eagles' efforts to reduce delinquency? No rational correlation can be made between the state's promotion of a sacred religious text and commending the Eagles regarding juvenile delinquency. The absence of plausibility of the legislative recitation compels a finding of a lack of valid secular purpose for the monument. Stone, supra.

The legislative recitation also fails this court's secular purpose prohibitions against promotion of religion in general and advancement of a particular religious belief. Edwards, supra. The monument presents an apparently unique wording

of the Ten Commandments, which is similar to but allegedly not identical to the Jewish and Christian versions. Nevertheless, it cannot be denied that the monument promotes and advances a particular religious belief. Indeed, the monument contains undeniably sectarian symbols of two major religions: two small stars of David, the traditional symbol of Judaism, and a Chi/Rho, the traditional symbol of the Christ of Christianity. 351 F.3d 173, 176. These symbols are undisputedly religious and sectarian. Thus, the monument's promotion of either religion in general or the advancement of a particular religious belief compels a finding that the legislative recitation is not a valid secular purpose. As a result, the legislation and monument at it issue fail the secular purpose prong of Lemon and must be enjoined under the Establishment Clause.

The Fifth Circuit opinion attempts to bolster its casual examination of the legislative recitation by citing the 42 years that the monument has existed without legal complaint. The opinion makes the remarkable, if not astonishing, assertion that "[h]ad this monument been recently installed, the inference of religious purpose would have been stronger." One can only conclude that the Fifth Circuit opinion assumes that the Ten Commandments have only recently taken on a religious significance! Suffice it to say that the Fifth Circuit's reliance on the lack of recency of the monument, as proof of a secular legislative intent, displays a paucity of reason. As the Court said in Walz v. Tax Comm'n of New York City, 397 U.S. 664, 678 (1970): "no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it."

The decision of the Court of Appeals must be reversed under the first Lemon prong.

II. THE TEXAS CAPITOL TEN COMMANDMENTS MONUMENT UTTERLY FAILS TO PASS CONSTITUTIONAL MUSTER AS AN ENDORSEMENT OF RELIGION CONSIDERING ITS CONTENT AND CONTEXT.

In evaluating the government's use of religious symbolism under the second Lemon prong, the Supreme Court has held that it "must ascertain whether 'the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices.'" County of Allegheny v. ACLU of Pittsburgh, 492 U.S. 573, 597 (1989).

> A public school's sponsorship of a religious message is impermissible under the establishment of religion clause of the Federal Constitution's First Amendment, because such sponsorship sends (1) the ancillary message to members of the audience who are nonadherents that they are outsiders and not full members of the political community; and (2) an accompanying message to adherents that they are insiders and favored members of the political community.

Santa Fe Ind. Sch. Dist. v. Doe, 530 U.S. 290, 309-310 (2000); See also, County of Allegheny, 492 U.S. 573, 593-597 (1989) (citing Wallace v. Jaffree, 472 U.S. at 70 (O'Connor, J., concurring in the judgment)) and Grand Rapids v. Ball, 473 U.S. 373, 389-392 (1985)). This principle is at least as applicable when the religious message is sponsored by government at a state capitol "which is so plainly under government ownership and control that every

display on its property is marked implicitly with government approval." ACLU v. McCreary County, 354 F.3d 438, 461 (6th Cir. 2003)(internal quotation marks omitted).

The analytical task under County of Allegheny, supra, is to determine whether the religious symbol "in [its] 'particular physical setting[],' has the effect of endorsing or disapproving religious beliefs." County of Allegheny, 492 U.S. 573, 597 (1989).

The Fifth Circuit opinion notes that the Ten Commandments monument is located on the 23 acre grounds of the Texas capitol on the north side of the Capitol Building on a line drawn between the Supreme Court and the Capitol Rotunda, about 75 feet from the Capitol Building, and 123 feet from the Supreme Court Building. 351 F.3d 173, 176. According to the Fifth Circuit opinion, the present location of the monument was carefully chosen to be at a point on the direct line between the legislative chambers, the executive office of the governor, and the Supreme Court Building, to as to be a "link[] with those houses of the law while standing apart and not physically connected to any of them. The Decalogue is presented as relevant to these law-giving instruments of State government, but from a distance." 351 F.3d 173, 181. The National Historic Landmark that is comprised of the 23 acres is dedicated by Texas statute to the display of "statutes, memorials, and commemorations of people, ideals and events that compose Texan identity; these displays document the struggles and the successes that Texans have experienced in the past and serve to inspire us as we face the challenges of today." 351 F.3d 173, 180.

The Fifth Circuit opinion's conclusion that "a reasonable viewer would not see this display as either a State endorsement of the Commandment's religious message or as excluding those who would not subscribe to its religious

statements," is unsupported by any aspect of the monument's purpose, placement, or context.

The Fifth Circuit's almost exclusive reliance on the placement of the monument between the three main "law-giving instruments of State Government," for its finding of no endorsement is unavailing. 351 F.3d 173, 181. Instead of supporting the conclusion that a reasonable observer would not perceive the monument to be an endorsement or disapproval of religious beliefs, quite to the contrary, the Fifth Circuit opinion makes it plain that the state intended to and does convey the impression that this Judeo/Christian religious text is relied upon in the enactment, administration, and interpretation of the laws of Texas by its location between these "law-giving" buildings. Id. As pointed out above, there is nothing in the record that suggests that the Ten Commandments are related to the enactment of the laws of Texas or anywhere else. The suggestion by the state, by the placement of the monument, that its laws are based on or related to the Ten Commandments, is an endorsement of their adherents' religious beliefs, and disapproval of the beliefs of nonadherents, which violates the standards that this Court has applied to government placement of religious symbols under the second Lemon prong.

In Stone, supra, this Court relied upon the lack of the Ten Commandments' integration into the school curriculum in an otherwise secular context for the appropriate secular study of history, civilization, ethics, comparative religion, or the like. Id., at 42. It held that the posting of the texts on the wall "serves no such educational function." Id. Here, although the Fifth Circuit opinion alludes at the outset to the National Historic Landmark's dedication to the display of statutes, memorials, and commemorations of people, ideals and events" composing Texan identity, the opinion makes no

attempt to explain how the Ten Commandments are related to the purpose of the National Historic Landmark. 351 F.3d 173, 175-176. Indeed, there is nothing obvious in the text of the Ten Commandments that in any way suggests a relation to the people, ideals and events of Texan identity, and the Fifth Circuit opinion doesn't suggest that it does. Just as this Court held in Stone that posting the text on the school house wall served no educational function, the exhibit of the Ten Commandments bears no rational relationship to the dedicated purposes of the National Historic Landmark. Therefore, it cannot be seen as other than an endorsement or disapproval of religious belief that is obvious from the face of the text.

The Fifth Circuit opinion additionally makes an allusion to tours of the Capitol Building provided by the Visitor Services of the State, and publishes a written guide for walking tours of the grounds for visitors, as if these factors were relevant to the reasonable observer inquiry. 351 F.3d 173, 175-176. Nothing is suggested in the Fifth Circuit opinion, however, that these tours or written guide include the Ten Commandments monument at issue, or even how a reasonable observer should obtain such a tour or written guide. In addition, the Fifth Circuit opinion attempts to blur the distinction between public property forum neutrality principles, as found in such cases as Capitol Square Review and Advisory Bd. v. Pinnette, 515 U.S. 753, 779-780 (1995), and Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001), and the government's display of religious messages principles. 351 F.3d 173, 177-178. This Court has not adopted the reasonable observer standard of Justice O'Connor's concurrence in Capitol Square for government religious displays. Cf., 515 U.S. 753, 779-780 (O'Connor, J., concurring in part and concurring in judgment) and 515 U.S.

753, 797-807 (Brennan, J., dissenting). Indeed, Justice O'Connor's reasonable observer appears to present an unworkable standard. How much research must the reasonable observer undertake to discover the legislative history of the Ten Commandment's monument legislation, its dedication ceremony, and the rationale for its placement location? How practical is it to require that she have taken a tour of the Capitol Building, or obtained the proper brochure of the National Historic Landmark layout, which may or may not disclose the existence of the Ten Commandments monument, as the Fifth Circuit opinion suggests? 351 F.3d 173, 175-176. The failure of the reasonable observer to have fully acquainted herself with the legislative and other history of a government religious display does nothing to diminish the "perce[ption] by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices." County of Allegheny, 492 U.S. 573, 597.

There is nothing in the text of the Ten Commandments monument itself that discloses a secular legislative intent, or connects it to other monuments scattered about the 23 acre landmark site. From the lack of connection to the other statues and monuments on the capitol grounds, the reasonable observer could just as easily conclude that the Ten Commandments was not a part of the display of "significant events and strands of Texas history." 351 F.3d 173, 177. In County of Allegheny, this Court held that the crèche standing alone in a prominent area of the courthouse violated the Establishment Clause despite "[t]he presence of Santas or other Christmas decorations elsewhere in the county courthouse, and of the nearby gallery forum." 492 U.S. 573, 599, n. 48. As in County of Allegheny, the Ten Commandments monument stands alone in its physical setting

in a prominent location between the houses of government, so that "no viewer could reasonably think that it occupies this location without the support and approval of the government." 492 U.S. 573, 599-600.

The decision of the Court of Appeals must be reversed under the second Lemon prong.

CONCLUSION

The Ten Commandments monument, displayed alone by state government in a prominent position on the Texas state capitol grounds midway between the three "law-giving" buildings with the intent of showing the prominent effect of this religious text in the enactment, administration, and construction of Texas laws, together with its enabling legislation, violates the purpose prong of Lemon. In addition, the monument is lacking in any secular context that would cause a reasonable observer to perceive anything but the government's endorsement or disapproval of religious beliefs. Amicus respectfully requests that the Court of Appeals for the Fifth Circuit be reversed.

Dated: December 13, 2004

Respectfully submitted,

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November 30, 2004

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Dear Mr. Bruno,

I hve filed with the Supreme Court a blanket consent to all amicus briefs, on both sides, in *Van Orden v. Perry*. Please let me know if I can be of any further assistance.

Sincerely,

s/_____
Erwin Chermerinsky

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November 29, 2004

VIA U.S. MAIL

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Re: *Thomas Van Orden v. Rick Perry, et al.*, No. 03-1500

Dear Mr. Bruno:

The Respondent Texas consents to your filing of an amicus brief in this matter.

Sincerely,

s/_____
Amy Warr

AW/sl